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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 140.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY OF APPELLANT KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., IN OPPOSITION TO MOTIONS TO DISMISS

JAMES D. CONWAY,
ELMER J. JACKSON,
Hastings, Nebraska,
DOUGLAS GLEASON,*
THOMAS E. GLEASON,
JULES V. DOTY,
Ottawa, Kansas,
HOLLIS B. LOGAN,
Topeka, Kansas.

*Attorney upon whom service should be made.

INDEX

Judgment Appealed from Does Not Rest on Nonfederal Grounds 2

Effect of Commission Orders Not Confined to "Production and Gathering" 7

Conclusion 9

Cases Cited

Davis v. *Wechsler*, 263 U.S. 22, 68 L. Ed. 143 5-6

Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U.S. 239, 76 L. Ed. 265 6

Kansas-Nebraska Natural Gas Co. v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704 3

N.A.A.C.P. v. *Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488 6

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This will reply to and oppose the motion to dismiss this appeal filed jointly by the State Corporation Commission of the State of Kansas[2] and the Southwest Kansas Royalty Owners Association[3] and the motion to dismis

1. Hereafter called Kansas-Nebraska or appellant.
2. Hereafter called Commission.
3. Hereafter called Royalty Owners.

this appeal filed by Panhandle Eastern Pipe Line Company.[4] Both motions were filed purportedly pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States. Both motions raise substantially the same primary question and present substantially the same arguments in support of the requested relief. The motions urge generally that this Court should not indicate probable jurisdiction because the judgment of the Kansas Supreme Court from which this appeal is taken rests on adequate nonfederal grounds, because the federal questions sought to be reviewed in this appeal were not timely or properly raised, and because no substantial federal question is presented by this appeal. Panhandle's motion states a subsidiary question to be whether the Commission or the private pipe line companies shall fix the amount of gas to be produced from the Kansas Hugoton gas field.

Judgment Appealed from Does Not Rest on Nonfederal Grounds

Appellant Kansas-Nebraska during the course of the hearings before the Commission, in its Applications for Rehearing presented to the Commission after entry of the orders complained of, in its Petitions for Judicial Review filed in the District Court of Finney County, Kansas, and in its Appeal to the Kansas Supreme Court, raised, presented and argued the federal questions presented in this appeal to the Supreme Court of the United States. At no stage of the above proceedings did appellant abandon or fail to urge its positive position on the federal questions which it now asks this Court to consider and decide. (Jurisdictional Statement pp. 4-5 and references there noted.) The Kansas Supreme Court in the judgment appealed from did not rest its decision

4. Hereafter called Panhandle.

on adequate nonfederal grounds. It expressly determined substantial federal questions which were properly and timely presented.

Both motions to dismiss, insofar as they argue that the judgment of the Supreme Court of the State of Kansas from which this appeal is taken rests on adequate nonfederal grounds, are clever attempts to make form appear to be substance and substance appear to be form.

The argument is that Kansas-Nebraska's appeal to the Kansas Supreme Court from the judgment of the District Court of Finney County, Kansas, was decided adversely to appellant on the jurisdictional/procedural ground that the Court in Finney County was without jurisdiction to entertain the proceedings appellant instituted there to have the Commission orders reviewed. The question was presented and argued as to whether two different state district courts—courts of concurrent jurisdiction—could both take jurisdiction of proceedings to review the same Commission order under provisions of the statute authorizing judicial review of Commission orders entered in administering the Gas Conservation Act.

The Kansas Supreme Court in an earlier opinion had dealt with consolidated appeals from judgments of two different district courts rendered in two separate proceedings in which the same Commission order had been subjected to judicial review. Propriety of this procedure was not directly questioned. There was no indication in that opinion that the seeking of separate reviews of that Commission order—in the same manner in which separate reviews were sought in two different district courts of the same Commission orders in this case—was subject to any jurisdictional/procedural objection. (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P.2d 704.)

In the consolidated appeals which resulted in the judgment from which this appeal is taken the Kansas Supreme Court did directly consider the propriety of such procedure. It did decide that only a single review of such a Commission order was contemplated and the district court in which a petition for review is first filed acquires jurisdiction to review the order to the exclusion of any or all other district courts. (See Jurisdictional Statement, Appendix "A", pages A1-A2 and A8-A9).

Review proceedings had been instituted by the Royalty Owners in the Stevens County District Court a few days before appellant initiated similar proceedings in the Finney County District Court. Under the rule announced by the Kansas Supreme Court in the opinion filed with the judgment appealed from, the Stevens County Court acquired exclusive jurisdiction to review the Commission orders and appellant could have and should have participated in the proceedings begun there. But this rule was announced in a single opinion dealing with all the appeals taken from the Stevens County District Court's judgment and the appeals taken from the Finney County District Court's judgment, all of which had been consolidated for hearing. That opinion was handed down on the same day and immediately after the Kansas Supreme Court had handed down its opinion in another group of consolidated appeals involving similar Commission gas allowable orders applicable to earlier proration periods. (192 Kan. 1, 386 P.2d 266. See Jurisdictional Statement, Appendix "B", pages A15-A56.) This first opinion was incorporated by reference in the opinion filed with the judgment here appealed from.

It is clear from a reading of both opinions that the Kansas Supreme Court had presented to it the same federal questions which are presented in this appeal. It is

clear that the Kansas Supreme Court squarely faced and directly decided these federal questions adversely to appellant's position and contentions. It is equally clear that the Kansas Supreme Court regarded appellant's appeal there as having been decided on its merits before considering, primarily for the guidance of future litigants, the jurisdictional/procedural question and before announcing the rule noted above and relied on in the motions to dismiss. This is revealed in part in the following two paragraphs quoted from the opinion filed with the judgment appealed from.

> "The questions presented by these appeals were determined in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ....., ... P.2d ..... insofar as they challenge the Commission's orders for the reason that they are not supported by a substantial competent evidence; they violate the provisions of the Gas Conservation Act or the Commission's basic order; they constitute an interference with interstate commerce; they invade the province of the Federal Power Commission under the Natural Gas Act, or they violate the due process clause of the United States Constitution or impair the obligation of contracts. Undue repetition will be avoided if we incorporate that opinion here by reference as determinative of the issues mentioned. We do so.
>
> "There remains for determination the jurisdictional dispute between the two district courts, and the constitutionality and effect of G.S. 1961 Supp., 55-703, which amended G.S. 1949, 55-703." (Appendix "A", Jurisdictional Statement, pages A4-A5.)

Even if the Kansas Supreme Court had intended to rest its decision in appellant's appeal on state jurisdictional/procedural grounds there would be no jurisdictional bar to this Court's consideration of the Kansas Supreme Court's decision on the federal questions. (See *Davis* v.

Wechsler, 263 U.S. 22, 68 L. Ed. 143; *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 76 L. Ed. 265; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488.)

Panhandle's motion to dismiss argues that appellant, in its appeal from the Stevens County District Court judgment, failed to save any federal questions. In the joint motion to dismiss of the Commission and the Royalty Owners it is argued that appellant, in its appeal from the Finney County District Court, did save the federal questions but then abandoned them by not arguing them in its brief.

Appellant did not participate in the proceedings in Stevens County. It appeared only specially to challenge the jurisdiction of the Stevens County District Court. Nevertheless it did appeal from the judgment of that Court and it specified as error the failure of that Court to consider and rule upon the constitutionality of the pertinent statute as implemented by the Commission's orders. Appellant initiated and participated in the proceedings in the Finney County District Court and its pleadings there detailed all the federal questions which are presented in this appeal. (Jurisdictional Statement, Appendix "G", pages A80-A81.) All those questions were saved on appeal to the Kansas Supreme Court by detailing them in the Specifications of Error in the abstract which appellant filed jointly with appellants Northern Natural Gas Company and Cities Service Gas Company. In cooperation with counsel for those companies appellant in its brief filed in the Kansas Supreme Court emphasized in and nearly confined its argument to issues of the reasonableness and lawfulness of the Commission's orders when measured against established rules of law applicable to orders of administrative bodies. However, appellant referred in its brief to the importance of the federal questions raised by its appeal and adopted the arguments made on those questions by its co-appellants Northern Natural Gas Com-

pany, Cities Service Gas Company and Colorado Interstate Gas Company. The Kansas Supreme Court and all parties to the appeals before it clearly understood that in light of recognized practices appellant was in fact arguing the federal questions involved with the very vigorous emphasis accorded those questions in the briefs of its co-appellants. It did so in a manner designed to relieve the Court of the necessity of reading and considering again the same arguments on the same questions framed in different words and phrases.

Effect of Commission Orders Not Confined to "Production and Gathering"

In both motions there is studied effort to clothe the Commission orders with some legitimate state purpose and to negate appellant's assertions that the orders are in conflict with federal authority. In this vein both motions make a point of appellant's candor in acknowledging in its Jurisdictional Statement that the state's power to limit production of natural gas from a common source of supply to prevent waste and protect correlative rights is no longer questioned. Our "candor" is nothing more than recognition of established law but it is seized upon triumphantly by appellees as though it were a damaging admission artfully wor from an obdurate but unwary adversary. They torture this statement of the law to make it yield authority for the Commission's orders but even under torture it cannot give up what it does not have. They conveniently ignore the word "limit" in the statement.

The Commission's orders do not limit production though terms of limitation are used as a polite bow to the Commission's statutory authority. The orders were not intended to limit production. They were intended to increase production. The Commission and the Royalty Owners unwittingly add another admission of this inten-

tion on page 9 of their joint motion when they say "If waste is caused by unwarranted limitation of production the *correction* of such a limitation is certainly a waste prevention measure.". (Emphasis supplied). The "unwarranted limitation," if such there ever was, was that lawfully ordered by the Commission itself in prior production allowable decisions. The "correction" referred to was in fact a reflection of the abandonment of all intention to limit production.

In the joint motion of the Commission and the Royalty Owners it is argued on page 8 that the orders were a valid exercise of state authority because they were "necessary and designed to prevent physical waste of natural gas and to protect the correlative rights of the landowners and lessees." There is no suggestion as to how the orders protected correlative rights as indeed there could not be. There is reference to the waste of gas which can result from corrosion of well casings. Such corrosion can permit the introduction of water into the producing formation causing damage to the reservoir. Also it can cause premature abandonment of production when the casing failure occurs before all recoverable gas is produced but when not enough gas remains to make it economically feasible to install new casing. Recommendations were made to the Commission by a witness for the Royalty Owners as to the level of allowable production required to prevent such waste. (He specifically insisted that his recommendations had nothing to do with and did not measure "market demand" for gas from the Kansas Hugoton Field.)

In paragraph H of the Report and Order of the Commission (Jurisdictional Statement, Appendix "E", pages A67-A68) the Commission states that it "cannot effectuate the recommendations" of the Royalty Owners' witness. It makes no reference to any purpose in its order

to prevent waste which might result from corrosion of well casings.

Panhandle argues in its motion beginning on page 7 that the Commission and not the private pipe line companies should determine the amount of gas which may be produced from the Kansas-Hugoton Gas Field. This argument is pointless—a blunt instrument with which Panhandle heroically destroys an ominous straw man of private pipe line company control which it built expressly for that purpose.

The Commission has always determined how much gas may be produced from the field. The pipe line companies have determined only how much gas they can and intend to purchase from the field.

The errors the Commission has made in its determinations and the conflicts of state with federal authority which have resulted from those errors, are already detailed in our Jurisdictional Statement.

Conclusion

The motions to dismiss should be denied. Probable jurisdiction of this appeal should be noted and it should be docketed for hearing and consideration on its merits.

Respectfully submitted,

JAMES D. CONWAY,
ELMER J. JACKSON,
Hastings, Nebraska,
DOUGLAS GLEASON,*
THOMAS F. GLEASON,
JULES V. DOTY,
Ottawa, Kansas,
HOLLIS B. LOGAN,
Topeka, Kansas.

*Attorney upon whom service should be made.